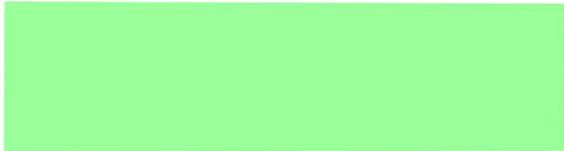
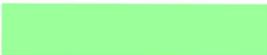


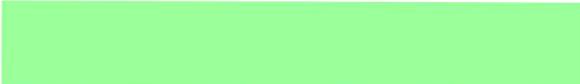


U.S. Citizenship  
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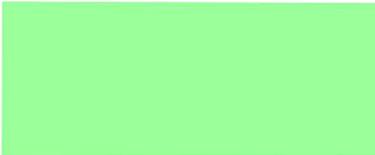


DATE: **AUG 13 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(15)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

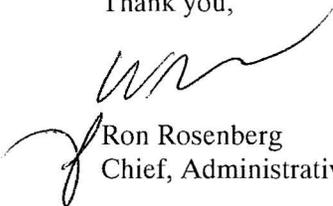


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center. In the Form I-129 visa petition, the petitioner describes itself as a marketing and advertising business established in 1986. In order to employ the beneficiary in what it designates as an operations management analyst position, the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief and additional documents in support of this assertion.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner states in the Form I-129 petition that it seeks the beneficiary's services as an operations management analyst to work on a full-time basis at an annual salary of \$54,725. In a support letter dated May 31, 2012, the petitioner states that the proffered position involves the following duties:

- Develop and propose strategies to improve [the petitioner's] efficiency and competitiveness in the marketing and advertising industry.
- Conduct evaluations and organizational studies; advise management on how to make [the petitioner] more profitable through reduced costs and increased revenues.
- Develop specific goals; plan, prioritize, and organize operating procedures.
- Confer with the executive producer and director of operations to ensure effective meeting of goals and objectives; assist in establishing long-range objectives and specifying the strategies and actions to achieve them.

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<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Review operational human resources related issues including development and communication of policies and training administration; develop and oversee implementation of changes to operational human resources.
- Develop, interpret and evaluate management operation guidelines and policies; analyze office operations and workflow, analyze organizational practices and procedures.

The petitioner stated the requirements for the proffered position as "a Bachelor's degree in Business Administration or a related field," and indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her foreign education. The petitioner provided an evaluation of the beneficiary's credentials prepared by [REDACTED] which states that the beneficiary has attained the equivalent of a Bachelor of Business Administration (Industrial Relations emphasis) from a regionally accredited college or university in the United States, and one year of graduate study in corporate finance and related subjects. In addition, the petitioner submitted copies of foreign diplomas and transcripts in the name of the beneficiary.

The petitioner provided a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification "Management Analysts" - SOC (ONET/OES) code 13-1111, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director requested that the petitioner submit probative evidence to establish eligibility for the benefit sought, and outlined the evidence to be submitted.

The petitioner and counsel responded to the director's RFE with a letter from the petitioner, dated November 16, 2012, and additional evidence including documents regarding the petitioner's business operations, printouts from online sources related to the occupational category "Management Analysts," and documents pertaining to the beneficiary's employment with the petitioner in TN visa classification.

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner and counsel claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish eligibility for the benefit sought and denied the petition. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and additional evidence.

## II. MATERIAL FINDINGS

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

#### A. Description of the Duties of the Proffered Position

To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (USCIS) must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation. The petitioner has not done so here.

In the instant case, the duties of the proffered position, as described by the petitioner in support of the Form I-129 petition and in response to the director's RFE, have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis.

Although in the RFE the director requested that the petitioner provide a more detailed description of the proffered position, the petitioner elected to provide the same list of generally stated duties with a breakdown of the percentage of the beneficiary's time to be spent on each duty. In addition, the petitioner stated that 10% of the beneficiary's time will be spent "in management, cost operation, overall operations of the company, and assessment of budget allocation and management." This statement is an example of the abstract level of information provided about the proffered position and its constituent duties. The petitioner does not specify what specific tasks the beneficiary is expected to perform regarding "management, cost operations, and overall operations of the company." Similarly, the petitioner asserts that the beneficiary will spend 10% of her time "confer[ing] with the executive producer and director of operations to ensure effective meeting of objectives" and "assist[ing] in establishing long-range objectives and specifying the strategies and actions to achieve them." The petitioner does not clarify how the beneficiary is expected to "assist," nor what "confer[ing]" entails or what "objectives" she will assess. The petitioner indicates that the beneficiary will dedicate 15% of her time to "[d]evelop specific goals; plan, prioritize, and organize operating procedures." This statement, which the petitioner asserts is a description of an "essential duty," does not provide sufficient insight into the actual work the beneficiary is expected to perform. As the petitioner has not adequately described the specific duties of the proffered position, the petitioner's assertions regarding the education required to perform the duties are not substantiated.

Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for

conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Thus, the petitioner has failed to demonstrate how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

On appeal, counsel asserts that it is not possible to provide specific details of the daily activities of the proffered position because it is a new position. The proffered position may be a new position; however, the petitioner is nonetheless required to demonstrate that it has non-speculative specialty occupation work available for the beneficiary for the duration of the requested validity period of the visa.<sup>2</sup> The generalized statements regarding the duties of the proffered position are insufficient to meet the petitioner's burden of proof in this regard.

Further, we note that on appeal counsel asserts that the director disregarded the organizational chart submitted in response to the RFE. Counsel indicates that this organizational chart reflects a change in the petitioner's organizational structure such that the proffered position now reports directly to the petitioner's president and CEO. We observe that the petitioner originally represented that the proffered position reports to the executive producer and director of operations, who in turn reports to the president and CEO. In response to the RFE, the petitioner submitted an organizational chart that effectively raises the level of responsibility of the proffered position to the highest level of management below the president.

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<sup>2</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

We must note that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner may not make material changes to an H-1B submission in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

#### B. Requirements for the Proffered Position

The academic requirement identified by the petitioner as the minimum education necessary to perform services in the proffered position does not qualify the position as a specialty occupation. Specifically, the petitioner stated that the duties of the proffered position require an individual with a bachelor's degree in business administration, or a related field. To qualify as a specialty occupation, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree (or a degree with a generalized title such as business administration, without further specification) does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose degree (including a degree in business administration) may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).<sup>3</sup> The petitioner's assertions that a general

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<sup>3</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

*Id.*

purpose degree is sufficient to perform the duties of the position indicate that the proffered position is not in fact a specialty occupation. Accordingly, the petitioner's assertion that its minimum requirement for the proffered position is only a general purpose bachelor's degree, i.e., a bachelor's degree in business administration, is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

### C. Unpublished Decisions

Counsel further refers to a 2006 unpublished decision in which he claims that we determined that the position of a management analyst proffered in that matter qualified as a specialty occupation. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

### III. SPECIALTY OCCUPATION

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics,

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physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer

scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As explained earlier in this decision, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the context of the petitioner's business operations. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the petitioner had adequately and accurately described the duties of the proffered position, we will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup> As previously discussed, the petitioner asserts that the proffered position falls under the occupational category "Management Analysts." We reviewed the section of the

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<sup>4</sup> All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational categories are hereby incorporated into the record of proceeding.

*Handbook* regarding the occupational category "Management Analysts," including the section entitled "How to Become a Management Analyst," which describes the following preparation for the occupation:

### **Education**

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA).

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

### **Licenses, Certifications, and Registrations**

\_\_\_\_\_ offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the \_\_\_\_\_ Code of Ethics. Management consultants with a CMC designation must be recertified every 3 years. Management analysts are not required to get certification, but it may give jobseekers a competitive advantage.

### **Work Experience in a Related Occupation**

Many analysts enter the occupation with several years of work experience. Organizations that specialize in certain fields typically try to hire candidates who have experience in those areas. Typical work backgrounds include management, human resources, and information technology.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Management Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited August 8, 2014).

When reviewing the *Handbook*, it must be noted that the petitioner designated the proffered position as a Level I (entry level) position on the LCA.<sup>5</sup> The wage levels are defined in DOL's "Prevailing

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<sup>5</sup> Wage levels should be determined only after selecting the most relevant O\*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Wage Determination Policy Guidance."<sup>6</sup> A Level I wage rate is described as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that many fields of study provide a suitable education for management analysts. The *Handbook's* narrative indicates that common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English. According to the *Handbook*, a range of programs can help people prepare for jobs in this occupation. The *Handbook* states that many analysts enter

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<sup>6</sup> Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

the occupation with several years of work experience, and that typical work backgrounds include management, human resources, and information technology. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a *specific specialty*, or its equivalent.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields (such as business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English) would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the *Handbook* indicates baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields (i.e., business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English), the *Handbook* indicates that a common field of study for this occupation is business and that some employers prefer to hire candidates who have an advanced degree in business administration. A *preference* for a candidate with a master's degree in business administration is not an indication of a *requirement* for the same. Furthermore, we reiterate that although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty degree in business is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum requirement for entry into this occupation.

In addition, the *Handbook* reports that management analysts are not required to get certification, but it may give jobseekers a competitive advantage. According to the *Handbook*, the [REDACTED] offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews,

and pass an interview and exam covering the [REDACTED] Code of Ethics. There is no indication that the petitioner requires the beneficiary to have obtained the CMC designation or any other professional designation to serve in the proffered position.

In its letters, the petitioner notes that the proffered position corresponds to an occupational category that is described by the Occupational Information Network (O\*NET) as requiring a "Zone 4" skill level in the OES/SOC database as support for the assertion that the proffered position qualifies as a specialty occupation.<sup>7</sup> However, the petitioner's reliance on this rating is misplaced. That is, O\*NET assigns this occupation a Job Zone Four rating, which groups it among occupations that are described as follows: "[m]ost of these occupations require a four-year bachelor's degree, but *some do not* (emphasis added)." Moreover, the O\*NET does not report that for those occupations with an academic degree requirement, that such a degree must be in a *specific specialty* directly related to the occupation. As previously discussed, USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the duties and responsibilities of the position. Further, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).<sup>8</sup> Notably, O\*NET indicates that some of these occupations do not require a four-year bachelor's degree.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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<sup>7</sup> The petitioner states that the beneficiary will serve in a position falling under the occupational category of "Management Analysts."

<sup>8</sup> The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of such positions require a four-year bachelor's degree, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner, which as previously noted has been designated on the LCA as a Level I position. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is a marketing and advertising business established in 1986, and has 30 employees. The petitioner stated its gross annual income as approximately \$4.4 million and its net annual income as \$188,480. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541810. According to the U.S. Census Bureau, NAICS is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited August 8, 2014). The NAICS code specified by the petitioner is designated for "Advertising Agencies," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

This industry comprises establishments primarily engaged in creating advertising campaigns and placing such advertising in periodicals, newspapers, radio and television, or other media. These establishments are organized to provide a full range of services (i.e., through in-house capabilities or subcontracting), including advice, creative services, account management, production of advertising material, media planning, and buying (i.e., placing advertising).

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 541810 – Advertising Agencies, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 8, 2014).

With its initial submission in this matter, the petitioner provided three job announcements. However, this documentation does not establish the proffered position qualifies as specialty occupation. As a preliminary matter, we note that the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting

history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

We also make the following observations regarding these job announcements:

- Management Analyst-supervisor at [REDACTED] Center: This advertising organization is a trauma center and acute care facility, and therefore not similar to the petitioner. The position advertised focuses on billing and coding for medical services. Thus, the position is not parallel to the proffered position. Further, the advertisement indicates that the skills and knowledge needed to perform the duties of the advertised position are "typically attained" with a bachelor's degree in business administration, health care administration, or a related field. The posting does not indicate that a bachelor's degree in a specific specialty is *required*.
- Operations Analyst at [REDACTED] LLC: This position requires a "Bachelor's Degree or equivalent" but does not specify that the degree must be in a particular specialty. As previously discussed, a position qualifies as a specialty occupation only if performance of the duties requires a degree in a *specific specialty* directly related to the occupation. Further, we note that the advertised position requires substantial knowledge of specific computer applications and IT processes. The petitioner has not indicated that the proffered position involves an in-depth knowledge of specific computer applications.
- Operations Analyst at [REDACTED] The advertising organization is a provider of employer-sponsored work/life integration solutions, and thus, it is not similar to the petitioner, which describes itself as a marketing and advertising business. Like the previous advertised position, this position does not require a degree in a specific specialty.

When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Neither counsel nor the petitioner have specified what characteristics they believe the petitioner shares with these organizations. As previously noted, without further information, the petitioner has not established that the advertisements are for similar organizations. Additionally, some of the advertisements appear to be for dissimilar positions. Further, contrary to the purpose for which they were submitted, the advertisements do not demonstrate that a bachelor's degree in a *specific specialty* (or its equivalent) is common in the petitioner's industry in parallel positions among similar organizations.

In addition to these observations, the petitioner fails to establish the relevancy of the provided examples to the issue here.<sup>9</sup> That is, the petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>10</sup>

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is (1) common to the petitioner's industry (2) in parallel positions (3) among organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted organizational charts, various tax documents, a business license, PowerPoint slides regarding its services, and samples of the beneficiary's work product including documents related to its human resource policies.

Throughout the record, the petitioner and counsel repeatedly state that the proffered position qualifies as a specialty occupation under this criterion of the regulations. However, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex

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<sup>9</sup> As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

<sup>10</sup> The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position (for organizations similar to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.<sup>11</sup>

The petitioner has indicated that the beneficiary's educational background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, USCIS reviews the petitioner's past recruiting and hiring practices, information regarding employees who previously held the position, as well as any other documentation submitted by a petitioner in support of this criterion of the regulations.

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<sup>11</sup> This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Upon review of DOL's instructive comments, we observe that the petitioner did not designate the proffered position as involving "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II) when compared to other positions within the same occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner has indicated that the proffered position is a new position. Thus, upon review of the record, the petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner and counsel claim that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We reviewed all of the evidence in the record, including organizational charts, tax documents, the petitioner's business license, and PowerPoint slides regarding the petitioner's services.<sup>12</sup> We also considered the petitioner's statements regarding the proffered position. However, the record does not support the assertion that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we also reiterate our earlier comments and findings with regard to the implication of

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<sup>12</sup> We note that the documents in the record identified as the beneficiary's work product are not probative in regard to the proffered position as the petitioner has represented that the beneficiary currently serves in a position other than the proffered position pursuant to the terms of her TN visa. Thus the relevancy of the beneficiary's work product to the responsibilities of the proffered position has not been established.

the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties.

The petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

#### IV. CONCLUSION AND ORDER

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition is denied.